

NTSB Order No. EA-4090

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 14th day of February, 1994

Docket SE-12154

allegedly careless taxiing of a PA-34 aircraft through an aircraft parking area so as to strike the nose cone of a parked aircraft, causing damage to both aircraft, in violation of 14 C.F.R. 91.9.<sup>2</sup> For the reasons discussed below, respondent's appeal is denied and the initial decision is affirmed in its entirety.

It is undisputed that on January 11, 1990, after landing at Tamiami Airport, Miami, Florida, respondent taxied between a maintenance hangar and a row of parked aircraft and allowed the left wing of his aircraft to strike the nose cone of a Cessna 402 aircraft which was parked in that row, causing visible damage<sup>3</sup> to both aircraft. Although respondent took the position at the hearing that the collision was not due to any carelessness on his part,<sup>4</sup> on appeal he does not directly contest the law judge's

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<sup>2</sup> Section 91.9 [now recodified as § 91.13(a)] provided:

**§ 91.9 Careless or reckless operation.**

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

<sup>3</sup> The record indicates that respondent's insurance company paid the owner of the Cessna 402 \$1,000 to cover the cost of repairs. (Tr. 74-5.)

<sup>4</sup> Respondent's defense focused on the following facts: 1) at the time of the incident it was either dark or almost dark; 2) his taxi through the parking area was delayed by several minutes because of a truck in the taxi lane which was eventually moved; 3) the Cessna 402 he struck was protruding farther out into the taxi lane than the other aircraft parked in that row; and 4) the amount of damage was, according to his witnesses, slight. We agree with the law judge that none of these circumstances are exonerating, or even mitigating, in this case.

finding that respondent was careless.<sup>5</sup> Rather, he argues on appeal that the law judge erred in not permitting discovery and introduction of evidence on respondent's claim that he was the subject of impermissible selective prosecution by the Administrator. He also contends that he was denied a fair hearing because the law judge exhibited extrajudicial personal bias and acted as an advocate for the FAA.

The law judge properly held that respondent's claims of selective prosecution are not relevant to the Board's adjudication of this case. Despite respondent's repeated and vigorous assertions that, not only should the Board recognize this as a legitimate defense, but also the Administrator is obligated to assist him in developing favorable evidence to support his position, we continue to believe that claims of selective enforcement are inappropriate for our consideration. As we said in Administrator v. Kaolian, 5 NTSB 2193, 2194 (1987), where we upheld the law judge's refusal to allow evidence on what the respondent in that case claimed were selective enforcement policies of the FAA:

[s]uch evidence, which goes to the matter of prosecutorial discretion exercised by the enforcement agency, is clearly irrelevant to the Board's adjudication of this or any other case. The Board's role is to review the evidence in a particular case to determine if it supports the allegations

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<sup>5</sup> To the extent that respondent does appeal from the law judge's finding that respondent's operation was in violation of section 91.9, we note our complete agreement with the law judge's rejection of respondent's defenses as meritless, and his conclusion that "[t]his collision no matter how slight, indicates carelessness, and as such, had the potential . . . to endanger the life or property of others." (Tr. 217.)

against the particular respondent.<sup>6</sup>

Even if this were a proper forum for respondent's claim, we are doubtful that respondent's assertions,<sup>7</sup> assuming they are true, would rise to the level of improper selective prosecution.

Nor can we find that his claim should have any effect on the sanction in this case. The 30-day suspension affirmed by the law judge is reasonable, and consistent with sanctions affirmed in similar cases.<sup>8</sup>

Regarding respondent's claim that the law judge in this case exhibited extrajudicial bias and acted as an advocate for the FAA, we find no evidence whatsoever of bias or prejudice in the record. To the contrary, our reading of the record convinces us that the law judge's handling of the case was at all times fair

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<sup>6</sup> See also Administrator v. Foster, NTSB Order No. EA-2883 at 19 (1989); Administrator v. Custard, NTSB Order No. EA-3806 at 4 n. 6 (1993); Administrator v. Renner, NTSB Order No. EA-3927 at 3 (1993); and Administrator v. Heimerl and Forrest, NTSB Order No. EA-4014 at 4 (1993), where we reaffirmed that it is not our role to evaluate or interfere with the Administrator's decisions as to which cases to prosecute.

<sup>7</sup> Respondent asserts that the FAA failed to take action in numerous other instances of "wing tip property damage . . . or a tail property damage type impact" which he claims occurred at this airport. (App. Br. at 12, citing Tr. Vol. 2, 10.) He further asserts that he was "singled out for prosecution because of his status as a county commissioner who threw his weight around." (App. Br. at 14). The Administrator disputes this, and states in his reply brief that the deposition testimony respondent relies on to support this assertion actually indicates that "respondent's position or attitude played [no] role in the decision to take an enforcement action." (Reply Br. at 26.)

<sup>8</sup> See Administrator v. Phipps, 1 NTSB 1615 (1972) (30-day suspension of ATP rating); Administrator v. Franks, 3 NTSB 3463 (1981) (80-day suspension of commercial pilot certificate).

and impartial. Indeed, we think his grant of respondent's motion for a continuance, after the FAA had presented its case in chief -- so that respondent could engage in discovery which he had neglected to conduct prior to the scheduled hearing date -- was exceedingly generous, and belies respondent's claims of bias and prejudice.

In support of his claim that the law judge acted as an advocate for the FAA, respondent cites two examples where, he maintains, the law judge questioned witnesses in order to develop a record favorable to the FAA. However, we are unable to discern in either instance any unfairness or partiality on the part of the law judge. In spite of respondent's implication that the law judge, in questioning to one of respondent's witnesses about the extent of the damage he observed to the nose cone of the Cessna 402, was attempting to corroborate the Administrator's evidence as to the extent of the damage, it is apparent that the law judge was merely trying to ascertain whether the witness was claiming that the damage was different in kind, or simply different in degree, from that testified to by the Administrator's witnesses.

Nor was there anything impermissible in the law judge's questioning of one of the Administrator's eyewitnesses as to whether he had identified respondent as the pilot of the offending aircraft.<sup>9</sup> The law judge acted well within his

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<sup>9</sup> We note that this questioning was essentially insignificant, as the Administrator's counsel had already elicited testimony on this point, and the identity of the pilot was not seriously open to dispute.

authority to question witnesses in order to clarify the record.<sup>10</sup>

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is denied;
2. The initial decision is affirmed; and
3. The 30-day suspension of respondent's pilot certificate shall commence 30 days after the service of this opinion and order.<sup>11</sup>

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HAMMERSCHMIDT, and HALL, Members of the Board, concurred in the above opinion and order.

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<sup>10</sup> See Administrator v. Winslow, 5 NTSB 2363 (1987). In addressing the respondent's contention that the law judge led a witness until the testimony conformed to the allegations in the complaint, we noted that our law judges have wide discretion in the conduct of hearings which permits them to interrogate the witnesses in order to clarify the record. Id. at 2370.

<sup>11</sup> For the purpose of this opinion and order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).